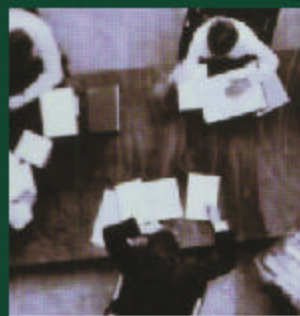
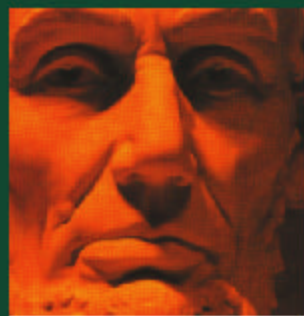
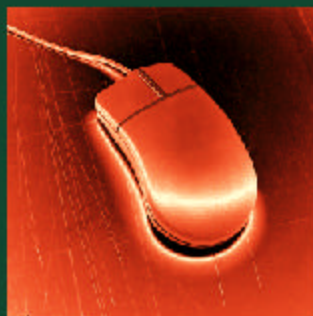


W R F

Wiley Rein & Fielding

VoIP at the Crossroads

February 2004





Wiley Rein & Fielding LLP

VOIP AT THE CROSSROADS:

A ROADMAP OF CURRENT GOVERNMENTAL ACTIVITIES REGARDING VOICE-OVER-THE-INTERNET SERVICES

FEBRUARY 2004

In the telecommunications world, 2004 promises to be the year of Voice-over-the-Internet Protocol, or VoIP. To the uninitiated, VoIP involves the placement of voice calls over packet-switched networks utilizing Internet Protocol (TCP-IP). This IP-based technology has the potential to revolutionize and even replace traditional circuit-switched telephone service. After years of stops-and-starts, the technological hurdles to VoIP are finally being overcome. It appears that 2004 will see the first substantial national deployment of both business and residential VoIP solutions.

Virtually every segment of the telecommunications industry has now announced plans for the aggressive deployment of VoIP-based solutions, from local phone companies to long distance carriers, cable companies to new emerging VoIP providers. While the commercial rollout of VoIP services is well underway, the regulatory status and related obligations of these services remain hotly debated. The interest in and attention to VoIP in the newspapers and on Wall Street are increasingly reflected in the regulatory and legislative fora.

VoIP issues appear to be a priority this year for the Federal Communications Commission ("FCC"). Just last week, the FCC initiated a comprehensive Notice of Proposed Rulemaking ("NPRM") addressing IP-enabled services, including VoIP offerings. Also pending before the agency are several petitions seeking clarification as to the regulatory classification and specific obligations of various types of existing VoIP services. The FCC additionally has open a number of broader rulemaking proceedings that will likely address how VoIP offerings fit into various aspects of the legacy regulatory regime.

The action on VoIP is not just at the FCC. Members of Congress and state public service commissions are increasingly vocal about their interest in this new service and how it should be regulated. Awareness of VoIP is also growing in international fora, as is concern about the ramifications of this new technology on existing international regulatory regimes. Any formal actions on VoIP taken by these entities will also have significant, long-term effects on VoIP and the telecommunications industry as a whole.

This roadmap is designed to be a general guide to all that is going on in the great VoIP debate. The attached exposition and summary chart identify and review the nature, scope and anticipated timing of VoIP-related proceedings and other significant activities at the FCC, in Congress, in the states, and internationally. The summary includes VoIP-specific proceedings, as well as broader subject matter dockets and inquiries that could impact how VoIP is regulated or the obligations of VoIP providers. Given the significance of many of these VoIP-related matters to a broad cross-section of the telecommunications industry, it is essential for VoIP providers, more traditional voice telecommunications companies, equipment manufacturers and other parties interested in VoIP to understand and stay abreast of all of these moving parts.

* * * * *

WRF hopes that this Roadmap will serve as a useful guide for navigating the multi-faceted VoIP debate, understanding the inter-relationships of the various proceedings, and identifying for your organization the many opportunities for participating in this important dialogue. Should you have any questions or require information about any VoIP-related matters, please contact:

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I. EXECUTIVE SUMMARY

The Federal Communications Commission

The FCC has been the focal point for much of the VoIP debate. The FCC currently has before it a variety of VoIP-specific proceedings. Many of these present for clarification vigorously debated questions about how to define the various types of VoIP services – are they telecommunications services or information services? Several of these proceedings also tee up key jurisdictional questions – are these VoIP services interstate or intrastate in nature and what is the oversight role of the states? Finally, these proceedings raise a whole host of questions about the compensation and other regulatory obligations of VoIP providers – which requirements apply and to what extent? It is expected that Commission action in these proceedings will establish the parameters of VoIP regulation. These proceedings include the following:

VoIP Notice of Proposed Rulemaking. Adopted just last week, this comprehensive NPRM appears to be a top-to-bottom examination of VoIP services and VoIP-related issues.

Pulver.com Petition. The FCC just granted a declaratory ruling that pulver.com's Free World Dialup service, a computer-to-computer VoIP offering, is an unregulated information service.

AT&T Declaratory Ruling Petition. This petition requests a ruling that AT&T's phone-to-phone IP telephony services are exempt from access charges. It has become the focal point of the access charge debate.

Vonage Preemption Petition. Vonage's petition seeks preemption of a Minnesota Public Utilities Commission order directing the company to comply with state telephony regulations. This petition raises broader questions about whether VoIP services (particularly, computer-to-computer and computer-to-phone offerings like Vonage's) are interstate or intrastate in nature and thus whether they are subject to state jurisdiction.

Level 3 Forbearance Petition. This petition requests that the FCC forbear from imposing access charge requirements on computer-to-phone and phone-to-phone VoIP services.

SBC Forbearance Petition and Declaratory Ruling Request. SBC recently filed two petitions – the first seeking a ruling that IP-based telephony services (computer-to-computer and computer-to-phone offerings) are information services and exclusively interstate in nature; the second requesting that the FCC forbear from imposing Title II requirements on such services.

While the Commission considers these VoIP-specific proceedings, it is also in a position to rule on a number of major dockets that could have significant collateral effects on VoIP deployment. Most of these broader subject matter proceedings do not address VoIP more than tangentially. However, the extent to which they determine VoIP fits into the legacy regulatory regime will

likely have profound and lasting ramifications on the development of VoIP as well as on the future of traditional telecommunications services with which VoIP providers compete. These proceedings include the following:

Universal Service. As the FCC examines whether to revise its universal service methodology, a key question will be whether VoIP providers will be required to contribute and, if so, at what amount. Also at issue will be whether VoIP providers could be eligible to receive universal service subsidies.

E911. Although VoIP technology currently limits the ability of these offerings to provide E911 access, the FCC is actively looking at whether mandatory E911 compliance should be extended to VoIP services.

Intercarrier Compensation. This proceeding has been pending for some time, but the current access charge debate with respect to VoIP services has brought new attention to the need for intercarrier compensation reform. It is anticipated that any action in this docket will address the rights and obligations of VoIP providers. However, it is likely that action on the AT&T petition will occur prior to broader compensation reforms.

Disability Access. The Commission has not yet acted on a pending Notice of Inquiry asking whether VoIP services should be subject to the mandatory access requirements of Section 255. Disability access has become a hot button issue in VoIP debates.

CALEA. The Department of Justice (“DOJ”), the Federal Bureau of Investigation (“FBI”) and other executive agencies are expected shortly to file a petition with the FCC seeking to extend the requirements of the Communications Assistance for Law Enforcement Act (“CALEA”) to broadband providers, including VoIP providers.

The Congress

VoIP is also emerging at the forefront of telecommunications issues in Congress. Questions regarding the regulatory treatment of this new technology are increasingly being raised in telecommunications-related hearings in both houses. VoIP legislation is expected to be introduced shortly by Senator Sununu. VoIP-specific provisions may also crop up on broader telecommunications-related legislation this year, such as in bills addressing E911 requirements and the Internet tax moratorium. It is anticipated that the FCC will receive increased expressions of interest from Capitol Hill as the agency continues its examination of VoIP issues.

The States

Many states have also initiated proceedings to address the regulatory status of VoIP. To date, the states have typically taken one of three approaches:

Hands-off Regulatory Treatment. *Florida* has largely exempted VoIP services from regulation.

Regulate VoIP as a Telecommunications Carrier. *Minnesota, New York and Wisconsin* have all found VoIP to be subject to state telecommunications regulation to some degree.

Initiate General Proceedings/Wait and See. *Pennsylvania, Utah, Ohio, Alabama, California, and Missouri* have all opened general proceedings to study the extent of their jurisdiction over VoIP.

Despite these differing approaches by the states, the National Association of Regulatory Utility Commissioners has adopted a resolution urging the FCC to affirm that phone-to-phone VoIP services are a telecommunications service.

Outside the United States

Finally, the United States is not alone in its interest in VoIP and the regulatory questions surrounding it. Foreign regulators and international regulatory bodies are also struggling with the issues. Most of these efforts are still at the study stage, although there is growing concern about the effect increased deployment of VoIP will have on global regulatory regimes, such as international settlement and accounting rates. Further, certain technological developments being embraced abroad – such as ENUM and Internet Protocol Version 6 – may encourage VoIP deployment.

II. VOIP-SPECIFIC PROCEEDINGS AT THE FEDERAL COMMUNICATIONS COMMISSION

On December 1, the Commission began its active consideration of VoIP with a public forum featuring state PUC commissioners, industry leaders, and specialized VoIP providers. The majority of the forum focused on the regulatory classification of VoIP and the effect that such classification will have on various public policy goals, such as universal service, emergency access, and disability access. Many panelists also commented on the market implications VoIP is beginning to have on the traditional telephony market. Concurrent with this forum, Chairman Powell announced the establishment of a VoIP Working Group that will spearhead future VoIP efforts at the FCC. Chairman Powell has most recently proposed a series of *Solutions Summits* that will bring together government and industry leaders to address VoIP-related issues. The first Summit is set for March 18 and will focus on E911 access to VoIP. Subsequent Summits are expected to focus on law enforcement and disability concerns.

All of the FCC Commissioners have stressed the need for expedient federal action to provide regulatory certainty and to foster the development of VoIP services. In particular, Chairman Powell has indicated a strong preference for leaving VoIP unregulated unless a clear showing is made that regulation is needed with respect to “rules designed to ensure law enforcement access, universal service, disability access, and emergency 911 services can and should be preserved in the new architecture.” Notably, Chairman Powell has also recently emphasized that VoIP should not be forced into the current regulatory regime. In a January speech to the National Press Club, the Chairman noted: “We cannot contort the character of the Internet to suit our familiar notions of regulation. [To do that would be to] dumb down the genius of the net to match the limited vision of a regulator.” Chairman Powell has been a champion of the dynamic and fast-changing environment of the Internet, seeking to limit “to a minimum the labyrinth of regulations and fees that apply to the Internet.”

Similarly, Commissioner Kathleen Abernathy, a consistent supporter of a hands-off regulatory approach for nascent services, recently suggested a number of “overarching predispositions” she had in looking at VoIP: an understanding that VoIP services are predominately federal; a skepticism with regard to economic regulation of VoIP services; and a commitment to ensure that VoIP services meet critical social policy objectives. Commissioner Abernathy has also pushed the Commission to act on the pending VoIP petitions to provide clarity to the industry as to the current rules even while the FCC moves forward on the future regulatory framework for VoIP. Commissioner Martin too has been supportive of efforts to further investigate VoIP issues, and to “facilitate market certainty ... by setting out a clear regulatory framework..” While he has expressed interest in the ability of VoIP providers to offer public safety and law enforcement functions, he has made limited public statements as to his beliefs regarding ultimate classification issues. However, Commissioner Martin is expected to take the position that all forms of VoIP should be subject to consistent obligations.

While Commissioner Jonathan Adelstein and Commissioner Michael J. Copps have been generally supportive of the Commission’s efforts to examine VoIP issues comprehensively, they have both expressed some concern that the FCC is not fully aware of the consequences of its

classification decisions. In particular, Commissioner Copps dissented from the Commission's decision granting the pulver.com petition and has voiced apprehension that the FCC entered into the VoIP NPRM with preconceived conclusions. Commissioner Adelstein also expressed concerns regarding the states' role in regulating VoIP. Both emphasize that the FCC's social policy objectives must be guaranteed in a VoIP environment before wholesale classification changes are implemented.

A. The Regulatory Basics of VoIP

The FCC's first pronouncements on VoIP issues can be traced back to the Commission's *Report to Congress* in 1998 ("Report" or "1998 Report to Congress"). In the *Report*, the Commission identified and described three general types of VoIP services:

- 1) **Computer-to-computer VoIP services.** These services do not connect to the public switched telephone network (PSTN); rather, they typically allow two computer users to contact each other over a broadband connection (for example, pulver.com's Free World Dialup service).
- 2) **Computer-to-phone (hybrid) VoIP services.** These offerings are either initiated or terminated over a broadband connection through computer software or specialized equipment (for example, Vonage's offerings).
- 3) **Phone-to-phone VoIP services.** The FCC defined phone-to-phone VoIP by setting out four characteristics of such offerings: (1) the provider must hold itself out as providing voice telephony or facsimile transmission service, (2) the provider must not require the customer to use customer premises equipment ("CPE") different from that CPE necessary to place an ordinary touch tone call or facsimile transmission over the PSTN, (3) the provider must allow the customer to call telephone numbers assigned in accordance with the North American Numbering Plan, and (4) the provider must transmit customer information without net change in form or content (for example, international calling cards).

In the *1998 Report to Congress*, the FCC also made tentative determinations as to the proper regulatory classification for such services. Under the Communications Act, the FCC has two general classifications for services: "telecommunications services," which fall under Title II of the Act and are subject to a comprehensive regulatory regime; and "information services," which fall under Title I of the Act and are largely free from FCC regulation. In the *Report*, the FCC suggested that computer-to-computer VoIP services were information services, while phone-to-phone VoIP services were telecommunications services. The FCC did not address the proper classification for hybrid VoIP services. The FCC suggested that it would revisit those tentative conclusions in a subsequent proceeding – which began with the VoIP NPRM last week.

B. The VoIP Notice of Proposed Rulemaking

On February 12, the FCC adopted a comprehensive NPRM addressing IP-enabled services, including VoIP offerings. While the exact scope and breadth of the NPRM will not be known until it is released in a few weeks, the Commission indicated its review of VoIP services would

be a top-to-bottom examination of VoIP services and VoIP-related issues. It is important to note at the forefront that the FCC purportedly made no tentative determinations in the NPRM as to any of the fundamental issues at stake. The FCC did, however, acknowledge several key (and potentially conflicting) objectives that will steer the debate. Specifically, the Commission recognized the need to guarantee and implement the FCC's vital social objectives even as services migrate to Internet platforms. The agency also stressed the need to allow Internet-based services to develop subject to minimal regulation. That tension, or perceived tension, will compel commenters and the Commission to attempt to balance those dual goals.

In its NPRM, the FCC asks the industry to describe and assess the different types of available VoIP services, and to determine for each type of service what the proper legal and regulatory framework should be going forward. Among the questions that will need to be answered for each type of service is: what is the proper regulatory classification of the service; and what is the jurisdictional nature of each service? Those threshold questions will give shape to the nature and extent of federal and state regulation that will apply to the different flavors of VoIP offerings. The Commission also asks for comment on a broad range of policy issues and objectives and how those objectives should be extended to or applied to VoIP offerings. Among the issues under consideration are universal service, access charges, public safety, and disability access. In addition, the agency is seeking input as to whether economic regulations and other common carrier-type obligations should be applied to different types of VoIP services. The role of state commissions, and their respective jurisdiction over VoIP services, will be a factor in that analysis. Concurrent with the release of the NPRM, the FCC also granted a declaratory ruling request filed by pulver.com, which is described in detail below. The FCC indicated that a second NPRM will be released in the near term addressing the extent to which VoIP services are subject to law enforcement and CALEA requirements.

C. VoIP-Specific Petitions

In recent months, there has been great debate about how various specific VoIP services fit into the existing regulatory classification scheme and the regulatory requirements to which they are subject. A number of carriers filed petitions with the FCC regarding the proper regulatory classification of particular services. The following chart gives a snapshot of those petitions, their current status, and the underlying technologies implicated by the requests:

Petition	Status	Phone-to-Phone	Computer-to-Phone	Computer-to-Computer
pulver.com	Granted			X
AT&T	Pending	X		
Vonage	Pending		X	X
Level 3	Pending	X	X	
SBC	Pending		X	X

Last week, the FCC acted upon the first of these VoIP-specific petitions.

pulver.com Petition. pulver.com asked the FCC for a declaratory ruling that its Free World Dialup service, a computer-to-computer VoIP offering, is neither telecommunications nor a telecommunications service. Free World Dialup does not allow customers to contact persons on the PSTN, and does not assign customers a traditional telephone number. The service requires customers to use special computer software and/or specialized equipment to access this peer-to-peer application. There is no charge for this service. The FCC granted pulver.com's petition, finding that Free World Dialup is neither telecommunications nor a telecommunications service. The FCC further concluded that pulver.com's service is an unregulated information service under Title I of the Act. The FCC declined to impose any economic or entry/exit regulation on Free World Dialup. The Commission also expressly declined to "impose any other type of regulation on Pulver's [service] at this time" deferring those issues to the broader NPRM. Lastly, the FCC ruled that the service was subject to federal jurisdiction, suggesting that state efforts to regulate the service would be preempted. Importantly, the FCC's order is limited to the Free World Dialup offering and does not extend to other pulver.com offerings or other computer-to-computer VoIP services.

The other service-specific petitions remain pending and are discussed in more detail below.

AT&T Declaratory Ruling Petition. In October 2002, AT&T filed a request for declaratory ruling that AT&T's phone-to-phone IP telephony services are exempt from access charges. Interestingly, AT&T's petition is the mirror opposite of a U S West petition filed in April 1999, but later withdrawn (U S West had sought a declaratory ruling that phone-to-phone VoIP offerings are subject to access charges). AT&T's service in question uses VoIP transport to connect two users on the traditional circuit-based networks (phone-to-phone VoIP). Based upon its interpretation of the *1998 Report to Congress*, AT&T argued that access charges cannot be assessed against its VoIP offering until the FCC affirmatively rules as such. AT&T also pointed to the congressional mandate to preserve the vibrant and competitive free market that presently exists for the Internet. IXCs, CLECs, and emerging providers generally support AT&T's petition. ILECs are generally opposed to the petition, arguing that access charges should be assessed under Section 69.5 of the FCC's rules until the FCC affirmatively rules that a service is exempted. The AT&T petition has become a focal point of the current access charge debate – highlighted by an actual debate before FCC staff between AT&T and SBC. House Commerce Committee Chairman Billy Tauzin has called for prompt resolution of this issue. Many believe that action on the AT&T petition is overdue, and prompt resolution of this issue is pivotal to end regulatory uncertainty. Others contend that a decision should be made only after the general VoIP proceeding is completed.

Vonage Preemption Petition. Vonage Holdings Corporation filed a petition for declaratory ruling in September seeking preemption of an order of the Minnesota Public Utilities Commission ("PUC"), which directed Vonage to comply with Minnesota laws and regulations governing telephone service providers. The service at issue, Vonage's DigitalVoice, does not allow calls to be initiated with a traditional telephone over the

PSTN. Rather, DigitalVoice is accessible only over a high-speed Internet connection with Vonage-specific equipment. However, Vonage's service allows its customers to call both other Vonage customers as well as non-customers connected to the traditional PSTN (thus, this is a computer-to-computer and a computer-to-phone VoIP offering). Vonage asked the FCC to find that Vonage's service is an information service and that "state regulation of these services unavoidably would conflict with the national policy of promising unregulated competition in the Internet." Vonage also asked the FCC to strike down the PUC's imposition of E911 requirements on Vonage's offerings. The pleading cycle for the petition has now closed. Subsequent to the filing of this petition, a U.S. District Court vacated the PUC's decision, finding that Vonage's service was an information service. While the court's decision may have mooted the particular case in controversy, the Commission nonetheless may decide to address the petition because of the broader implications the petition raises with respect to state jurisdiction over VoIP.

Level 3 Forbearance Petition. Level 3 Communications LLC on December 23, 2003 asked the FCC to "forbear from enforcing its governing statute and rules to the extent that they could be interpreted to permit LECs to impose interstate or intrastate access charges on IP-PSTN traffic and on certain PSTN-PSTN traffic." This petition is not limited to Level 3 offerings, but would extend to all similarly-situated VoIP services (computer-to-phone and phone-to-phone VoIP offerings). Level 3 views this as an interim measure until the unified intercarrier compensation proceeding is completed. ISP-bound traffic would not be impacted, nor would intraLATA traffic that is governed by interconnection agreements. Comments on this petition are due on March 1.

SBC Forbearance Petition and Declaratory Ruling Request. SBC filed two petitions this month to establish the proper regulatory framework for IP-based telephony services. Specifically, SBC filed a petition for declaratory ruling that IP-based services are exclusively interstate services. SBC defined IP-based services to include computer-to-computer and computer-to-phone VoIP offerings. Further, SBC seeks a finding that these VoIP services are information services under Title I, free from Title II requirements. SBC also filed a petition for forbearance asking the FCC to find that IP-based services do not have to satisfy Title II requirements. No pleading cycle has yet been established for comment on the declaratory ruling request; comments on the petition for forbearance are due on May 12.

III. OTHER RELEVANT FCC PROCEEDINGS

Beyond VoIP-specific dockets, the FCC currently has pending a number of major rulemaking proceedings on substantive issues of general applicability across a variety of services. Several of these inquire specifically about how VoIP fits into the legacy regulatory regime. However, all of these proceedings have the potential to significantly impact the future development of VoIP services. Further detail is provided below on the most important of these proceedings. Each of these major policy issues is expected to be explicitly addressed in the comprehensive VoIP NPRM. The interplay between the VoIP NPRM and these issue-specific proceedings will be a key development to follow.

Universal Service. All telecommunications service providers are required to contribute to the FCC's universal service program – at an amount averaging approximately nine percent of interstate revenues. Under the Act, information service providers are not required to contribute. In two open proceedings, the FCC is examining the future structure of the universal service fund and the proper contribution methodology for the fund. While VoIP services are not squarely at issue in either proceeding, the Commission will likely address the obligation of VoIP providers to contribute to the universal service fund within these proceedings, relying in large part on the regulatory classification of VoIP services.

Contribution Methodology: The FCC is currently considering fundamental changes to its universal service contribution methodology. In December 2002, the Commission adopted a series of interim measures to reform the current revenue-based mechanism. At that time, the FCC also issued a NPRM introducing four potential replacement contribution methodologies that are under consideration: a modified revenue-based approach; a number-based approach; and two different connection-based approaches. Within that NPRM, the FCC is considering the obligation of broadband providers (both DSL and cable modem services) to contribute to the universal service fund, but the obligation of VoIP providers to contribute is not addressed. Some VoIP providers contend that they already contribute to the universal service fund because their underlying access providers pass through their universal service obligation. Among the questions facing the FCC: whether VoIP providers can be required to contribute? If so, should they contribute the same amount as traditional telephony providers? Would the exclusion of VoIP providers jeopardize the sufficiency of the Fund?

Eligible Telecommunications Carrier Review: The Federal-State Joint Board on universal service is studying the manner in which competitive carriers (both CLECs and CMRS providers) receive universal service support as eligible telecommunications carriers. Key issues remain as to whether secondary lines should be eligible to receive support, and whether competitive carriers should receive support based on incumbents' costs or their own costs. A recommendation from the Joint Board is expected early this year. At this time, it appears that the Joint Board is divided on a number of issues, and may not reach a consensus. To the extent VoIP providers are found to be eligible to receive

universal service subsidies, this proceeding will likely help shape the extent and size of such subsidies.

E911. VoIP providers do not currently provide traditional E911 access to their customers due to limitations on VoIP technology with respect to providing the necessary callback and location data for E911 access. A group of VoIP providers represented by the VON Coalition, including AT&T, Vonage, pulver.com, Level 3 and others, has reached a voluntary agreement to provide limited E911 access within a set schedule. The FCC will need to consider if mandatory E911 compliance should be extended to VoIP services, and if such compliance is technically feasible. This past fall, the FCC asked for further comment on how the growth of VoIP offerings affects the ability of PBX manufacturers and providers to provide public safety access. The ability to provide reliable and comparable E911 access may become more of a marketing/consumer adoption issue than a regulatory issue. E911 issues will be the subject of the FCC's first Solutions Summit on March 18.

Intercarrier Compensation. In April 2001, the FCC issued a NPRM contemplating a unified regime for intercarrier compensation. The focus of that proceeding has been the adoption of a "bill and keep" approach under which carriers would no longer pay access charges for use of other carrier's networks. Industry groups continue to work towards a consensus proposal, and are expected to report to the FCC early this year on their progress. The current access charge debate over VoIP services, centered on the AT&T access charge petition, has brought new attention to the need for intercarrier compensation reform. The requirement for VoIP providers to compensate other providers for use of their networks, and the amount of such compensation, remain open questions. As a result, the outcome of intercarrier compensation reform will greatly impact VoIP providers' costs to provide service. The ultimate adoption of a bill-and-keep approach would effectively eliminate the current disputes over access charge payments and limit the possibility of regulatory arbitrage. Nevertheless, action on the AT&T petition will likely occur prior to any global reforms of the intercarrier compensation system.

Disability Access. Section 255 of the Act requires the FCC to ensure that telecommunications relay services are available to disabled persons to the extent possible. To that end, the Commission requires manufacturers of telecommunications equipment and providers of telecommunications services to guarantee that their services are accessible and available to the disabled community. Notably, Section 255 provides for access to telecommunications transmission services, as opposed to the traditional "telecommunications" and "information services." The FCC has read telecommunications transmission services broadly to include IP-based offerings, but has not specifically found that VoIP services are subject to Section 255. In a 1999 Notice of Inquiry, the FCC sought comment on the need to provide the disabled community with access to VoIP and IP-based services. The Commission has not acted upon that NOI. Many providers contend that mandatory requirements are unnecessary because carriers have pledged to voluntarily provide access for the disabled. Nonetheless, disability access

has been a hot button issues at the FCC's VoIP forum and other VoIP-specific industry events.

CALEA. The Communications Assistance for Law Enforcement Act ("CALEA") requires telecommunications carriers to ensure that their networks allow for law enforcement agencies to intercept telephone calls. The Commission has never specifically addressed the applicability of CALEA to VoIP providers, although law enforcement agencies have stressed the critical importance of extending CALEA obligations to all VoIP offerings. If mandated, CALEA compliance could prove to be an expensive and technologically challenging undertaking for VoIP providers. Some have suggested that voluntary compliance is sufficient. The DOJ, FBI, and other executive agencies have notified the FCC that they intend to file a petition to establish CALEA policies in a "comprehensive, technology neutral, manner rather than in a piecemeal fashion." The agencies will ask that a proceeding be initiated to "address a variety of issues including what broadband services and service providers should be subject to CALEA." The FCC has indicated that it will expeditiously seek comment on that petition, which is expected to be filed within the next few weeks.

IV. VOIP ACTIVITIES IN CONGRESS

Consistent with the FCC's recent focus, VoIP issues are also at the forefront of telecommunications issues on Capitol Hill. In an election year, the passage of any legislation is difficult. We anticipate that the likelihood of passage this year of telecommunications or VoIP-specific legislation is even more remote. Nevertheless, both direct and indirect congressional advocacy and influence will likely play a key role in steering the development of VoIP regulatory policies.

A. Committee Hearings

Both the House of Representatives and the Senate are expected to address VoIP early this year. The House Subcommittee on Telecommunications and the Internet held a February 4th hearing on telecommunications competition issues that squarely addressed VoIP developments. Likewise, the Senate Commerce Committee intends to hold a hearing on February 24th focusing on VoIP issues.

B. VoIP Legislation

Throughout this year, a number of members of Congress are expected to propose or suggest the need for VoIP legislation. For example, Senator John Sununu recently announced that he is preparing VoIP legislation to preempt state regulation as well as to limit FCC regulation of VoIP services. A draft of the Sununu legislation is expected to be circulated early this year. Other proposals are likely to follow. While such proposed legislation will surely add to and influence the debate, the likelihood any such bill will pass this year remains low.

C. Other Telecommunications-Related Legislation

Prior to this session of Congress, VoIP issues have been ancillary to the consideration of more general telecommunications topics, such as E911 access, broadband deployment, Internet taxation, and universal service reforms. The two issues likely to gain the most momentum this term are E911 funding reforms and reconsideration of the Internet tax moratorium. The specific E911 legislation under consideration would provide financial support to fund the public infrastructure necessary to support E911 access, particularly wireless E911 access. To date, VoIP-related issues have not played a central role in the debate on this legislation. However, the E911 obligations of VoIP providers could end up being addressed by the bill. The Internet tax moratorium, which exempted Internet-based services from state and local taxes, expired last November. A number of members of Congress have expressed interest in re-establishing the moratorium this term. Up to this point, opponents of the moratorium have focused their attention on the risk of including DSL and other broadband offerings under the moratorium. Senator Lamar Alexander has more recently expressed concern about the impact of exempting VoIP offerings from state and local taxes.

D. Advocacy

Direct and indirect pressure from Capitol Hill is likely to intensify as the Commission continues its examination of VoIP issues. The first wave of congressional input was provided by

prominent senators prior to the VoIP forum. Among them, Senator George Allen voiced support for a “national framework ... free of unnecessary or unreasonable regulatory costs or burdens.” Senator John McCain and John Ensign agreed, focusing on the need for regulatory certainty. More recently, House Commerce Committee Chairman Billy Tauzin wrote a letter to the FCC asking for prompt action on the AT&T access charge petition. In contrast, at a recent House Commerce Committee hearing, Ranking Member John Dingell warned the FCC not to “rush to reclassify” VoIP service as information service. He suggested that “it may be far wiser” to regulate VoIP offerings as a telecommunications service, but forbear from applying all Title II rules and regulations on VoIP services.

V. VOIP ACTIVITIES IN THE STATES

The debate over VoIP regulation extends beyond Washington as many states have initiated proceedings to address the regulatory status of VoIP. No consensus, however, has developed as to how states should, or can, regulate VoIP services. As a result, the FCC proceeding will have considerable impact on future and ongoing state proceedings and could potentially preempt some state regulation of VoIP services. The threshold question in many states will be a jurisdictional one – do states have the authority to regulate VoIP? Those states that have opened proceedings as to VoIP services have generally adopted one of three basic approaches:

1. ***Hands-Off Regulatory Treatment.*** *Florida* passed legislation largely exempting VoIP services from regulation, but that legislation did not address the applicability of access charges to VoIP offerings.
2. ***Regulate VoIP as a Telecommunications Carrier.*** The *Minnesota* PUC last year ruled that Vonage's VoIP offering is a "telecommunication service" and accordingly required Vonage to comply with all state telecom regulations, including compliance with E911 access requirements. A U.S. District Court subsequently vacated the PUC's decision, ruling that Vonage's offering is an "information service." The *New York* state commission in 2002 found that a VoIP provider was subject to access charges. The *Wisconsin* state commission has requested that VoIP providers file an application for authority to provide telecom services within the state. Even in these states that seek to regulate VoIP offerings, a common carrier-light approach has been prevalent, focusing on consumer protection issues.
3. ***Initiate General Proceedings/Wait to Regulate VoIP.*** A number of states have opened general proceedings to study the extent of their jurisdiction over VoIP and to assess the need for regulation of these services. Among these are *Pennsylvania, Utah, Ohio, and Alabama.* *California* had been one of the most aggressive state commissions in asserting jurisdiction over VoIP service providers. The *California* PUC recently initiated a general proceeding to further study VoIP issues. In its initiating order, the PUC tentatively concludes that VoIP that is interconnected with the PSTN is a "public utility telecommunications service." *Missouri* has opened a VoIP proceeding to seek input in formulating its position in response to the FCC's VoIP NPRM. *Colorado* also opened, and subsequently closed, a docket examining VoIP issues.

NARUC and Local Government Input on FCC Policy. Beyond advocating the intrastate regulatory treatment of VoIP offerings, the National Association of Regulatory Utility Commissioners has adopted a resolution finding that the FCC should affirm its tentative decision in the *1998 Report to Congress* that certain VoIP services are telecommunications services. The NARUC resolution stressed the need for multi-jurisdictional efforts to resolve VoIP issues. A

group representing the interest of local governments, including the National League of Cities and the U.S. Conference of Mayors, recently asked the FCC to delay any decision on VoIP-specific petitions until a general rulemaking proceeding is completed. These groups stressed the need for the FCC to protect the role of local government in the development of VoIP offerings, in particular as they relate to taxation and rights-of-way issues.

VI. VOIP ACTIVITIES OUTSIDE THE UNITED STATES

The FCC's focused attention on VoIP mirrors the increasing interest in VoIP regulatory issues by foreign regulators and international regulatory bodies. Because most overseas fora are just beginning to study the issue, any final pronouncement from the United States on the regulatory treatment of VoIP has the potential to be the basis for such regulations overseas. The following summarizes noteworthy VoIP-related activities abroad:

European Commission Ruling. The European Commission ("EC") has taken the position that Internet voice services do not constitute voice telephony unless: (1) they are offered commercially and separately to the public as voice services; (2) they are provided to and from PSTN termination points; and (3) they are offered in real time at the same level of speech quality and reliability as offered by the PSTN. Recent improvements in the quality of service and the growth of the European VoIP market may induce the EC to review its position on VoIP.

International and Regional Organizations. The International Telecommunication Union ("ITU") has studied IP telephony, without making any definitive rulings. The Inter-American Telecommunication Commission ("CITEL") has also commissioned a study on the current status and regulatory implications of IP telephony in the Americas.

Noteworthy Actions by Other Countries. Regulators in individual countries have additionally begun to examine this issue. For example, Bell Canada has filed an application with the Canadian Radio-television and Telecommunications Commission in November 2003 seeking the commencement of a hearing to examine whether a framework should be developed to regulate VoIP services. Bell Canada's request was motivated, in part, by the FCC's recent call to further examine VoIP issues. In the United Kingdom, it is reported that the regulator, Ofcom, has scheduled a meeting this month to address VoIP regulatory issues.

VoIP's Impact on the International Settlements Process. VoIP remains illegal in a number of developing countries, many of which are simply reluctant to allow cheaper VoIP services to cut into revenues attributable to international settlement and accounting rates. The FCC is expected to issue an order in the First Quarter of 2004 on international settlements reform, although it remains to be seen whether that order will address VoIP issues or defer them to a later proceeding.

ENUM. The ITU has set forth interim procedures for trials of ENUM, the protocol that allows the Internet and telephony platforms to be linked through the mapping of standard telephone numbers and Internet addresses. Under these procedures, the ITU has approved over twenty delegations of domain names corresponding to telephone country codes. Trials are currently underway in a number of countries, including Austria, China, Germany, Japan, Sweden and the UK. Additionally, the European Telecommunications Standards Institute has set forth guidelines for the interoperability of European ENUM trials. In the United States, ENUM trials are not yet under way but are being studied. A draft ENUM recommendation is also under consideration at the ITU. The adoption of

ENUM promises great benefit to VoIP providers. By linking IP addresses and traditional phone numbers, ENUM promises to expand the reach and scope of VoIP-enabled devices and applications.

Internet Protocol Version 6. Internet Protocol Version 6 (“IPv6”) has been developed by the Internet Engineering Task Force to replace the current Internet protocol, which has been in place for over twenty years. Proponents suggest that IPv6 will reduce Internet operation expenses, improve security, and foster new Internet-based applications. The wide deployment of IPv6 could spur even greater investment in Internet-enabled devices and applications, providing a broader platform with which to provided VoIP services. Until recently, IPv6 has garnered greater attention abroad. This has particularly been true in Asia, where governments and companies have been aggressively promoting and adopting IPv6. In addition, the European Union has developed plans and programs to facilitate IPv6 deployment. Here, in the United States, the Commerce Department just last month initiated an inquiry into the issues associated with IPv6, particularly focusing on transition and implementation issues as well as the security aspects of the technology. The Task Force has requested comment by March 8, and expects to report to the President on IPv6 deployment by the end of the year.

VII. VOIP FEDERAL REGULATORY AND POLICY DEVELOPMENTS SUMMARY CHART

Attached please find a summary chart identifying and reviewing selected federal proceedings and their impact on VoIP.

VIII. CONTACT INFORMATION

Should you have any questions or require information about any VoIP-related matters, please contact Nancy Victory. Ms. Victory is a partner in the firm’s Communications and Government Affairs Practices.

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VOIP FEDERAL REGULATORY AND POLICY DEVELOPMENTS SUMMARY CHART

FCC Proceeding	Impact on VoIP	Status
VoIP Notice of Proposed Rulemaking (2/04)	This comprehensive NPRM appears to be a top-to-bottom examination of VoIP services and VoIP-related issues, including the different types of VoIP services, the proper regulatory classification for each type of offering, and the associated regulatory obligations.	Adopted February 2004; release of NPRM expected shortly.
pulver.com Petition (2/03)	pulver.com requested a ruling that its computer-based IP telephony offering (Free World Dialup) is not a telecommunications or telecommunications service. pulver.com's service is offered for free, does not use traditional phone numbers, and does not allow its users to connect to the PSTN. The FCC granted the petition finding that the service was an unregulated interstate information service.	Granted February 2004.
AT&T Declaratory Ruling Petition (10/02)	AT&T requested a ruling that its phone-to-phone IP telephony services are exempt from access charges. ILECs contend that AT&T's service is a telecommunications service subject to access charges.	Comment cycle complete; awaiting action.
Vonage Preemption Petition (9/03)	Vonage seeks preemption of a Minnesota Public Utilities Commission order finding that Vonage's broadband VoIP offering was a telecommunications service and directing the company to comply with state telephony regulations. This petition raises broader questions about whether VoIP services (particularly computer-to-computer and computer-to-phone offerings like Vonage's) are interstate or intrastate in nature and thus whether they are subject to state jurisdiction.	Comment cycle complete; awaiting action.

FCC Proceeding	Impact on VoIP	Status
Level 3 Forbearance Petition (12/03)	Level 3 requests that the FCC forbear from imposing access charge requirements on all computer-to-phone and phone-to-phone VoIP services (not just Level 3's offerings).	Comments due March 1; reply comments due March 31.
SBC Forbearance Petition and Declaratory Ruling Request (2/04)	In its forbearance petition, SBC seeks a ruling that IP-based telephony services (computer-to-computer and computer-to-phone offerings) are information services and exclusively interstate in nature. In its declaratory ruling request, SBC requests that the FCC forbear from imposing Title II requirements on these services.	No comment cycle announced for declaratory ruling request; comments on petition for forbearance due May 12.
Senate Commerce Committee Hearing	This hearing before the Senate Committee on Commerce, Science and Transportation will focus on VoIP issues.	February 24
Solutions Summit	This is the first of a series of summits that will bring together government and industry leaders to address VoIP-related issues. The focus of this session will be on E911 access to VoIP.	March 18
Universal Service Contribution Methodology (12/02)	This NPRM considers whether comprehensive changes to the FCC's universal service contribution methodology are necessary. In particular, the FCC asked whether a transition from the current revenue-based methodology to a number-based or connection-based approach is warranted. As the FCC examines whether to revise its universal service methodology, a key question will be whether VoIP providers will be required to contribute and, if so, at what amount. Also at issue will be whether VoIP providers could be eligible to receive universal service subsidies.	Comment cycle complete; awaiting action.
E911 Access (11/03)	In November 2003, the FCC issued an Order extending E911 obligations to additional services and providers, but deferred to the states the implementation of E911 regulations and rules for multi-line telephone systems (<i>e.g.</i> , PBXs). Concurrently, the FCC issued a NPRM seeking further information about current E911 functionalities for multi-line telephone systems and specifically inquired about IP telephony. The FCC appears to be actively looking at whether mandatory E911 compliance should be extended to VoIP services.	Comments are due March 26; reply comments due April 26.

FCC Proceeding	Impact on VoIP	Status
Inter-Carrier Compensation (4/01)	This NPRM seeks comment on fundamental reform of all inter-carrier compensation mechanisms, with particular interest in moving to some form of bill-and-keep alternative. Under a bill-and-keep approach, carriers would not be obligated to compensate other carriers for use of their networks (<i>i.e.</i> , eliminating access charges). It is anticipated that any action in this docket will address the rights and obligations of VoIP providers. However, it is likely that action on the AT&T petition will occur prior to broader compensation reforms.	Comment cycle complete; awaiting action. A cross-industry group is expected to report to the FCC in the First Quarter of 2004 as to the possibility of an industry solution.
Disability Access NOI (9/99)	Part of a broader proceeding implementing Section 255 of the Act and ensuring disabled persons' access to telecommunications services, this wide ranging Notice of Inquiry asks whether VoIP services should be subject to the mandatory access requirements of Section 255.	Comment cycle complete; awaiting action.
DOJ CALEA Petition	DOJ, FBI and other executive agencies are expected to file a petition with the FCC to establish the CALEA obligations of broadband and VoIP providers.	Filing expected shortly.

CONTACT INFORMATION

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